

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

YASMIN MALIK,
Plaintiff,
v.
CITY AND COUNTY OF SAN
FRANCISCO, et al.,
Defendants.

Case No. [17-cv-06954-DMR](#)

**ORDER ON MOTION TO DISMISS
AND MOTION FOR JUDGMENT ON
THE PLEADINGS**

Re: Dkt. Nos. 26, 29

Plaintiff Yasmin Malik filed a complaint against the City and County of San Francisco (“San Francisco”); Solano County (“Solano”); and Sonny Ash, a former Solano County investigator, alleging claims for excessive force, deliberate indifference to medical needs, and malicious prosecution. Solano and Ash now move pursuant to Federal Rule of Civil Procedure 12(b)(6) to dismiss the complaint. [Docket No. 22.] San Francisco moves pursuant to Federal Rule of Civil Procedure 12(c) for judgment on the pleadings. [Docket No. 29.] These motions are appropriate for determination without oral argument. Civ. L.R. 7-1(b). For the following reasons, Solano and Ash’s motion to dismiss is granted, and San Francisco’s motion for judgment on the pleadings is granted.

I. BACKGROUND

Malik makes the following allegations in the complaint, all of which are taken as true for purposes of this motion.¹ Malik lives in Germany. Compl. ¶ 15. In 2013, she entered into an agreement with a third party, Cleveland Kennard, regarding the development of property in Solano

¹ When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citation omitted).

1 County owned by Malik and her husband. *Id.* at ¶¶ 8-10. In exchange for Kennard’s “carpentry
2 skills,” Malik promised him 50% ownership of the property at issue. *Id.* at 9. At some point,
3 Kennard demanded 100% ownership of the property, and “insisted that [Malik] file a warranty
4 deed form in his interest.” *Id.* at ¶ 14. Malik refused, informing him that she could not make such
5 a transfer “without her Husband’s signature,” and then returned to Germany. *Id.* at ¶¶ 14, 15.

6 In November 2013, Kennard filed with the Solano County Recorder’s Office a warranty
7 deed containing Malik’s husband’s forged signature which gave Kennard full ownership of the
8 property. *Id.* at ¶ 16. Kennard subsequently filed a complaint with the Solano County District
9 Attorney’s Office alleging that Malik had “defrauded him of his interest in the property.”
10 Defendant Ash, who was an investigator with the District Attorney’s Office, contacted Malik
11 regarding Kennard’s complaint and informed her that Kennard “said there was no contract.” *Id.* at
12 ¶¶ 17, 18. Malik faxed Ash “a copy of the contract and other documents, to prove that a contract
13 had in fact existed.” *Id.* at ¶ 18. Malik spoke with Ash several times in February 2015 “to try to
14 clear herself of the fraudulent accusations brought by Mr. Kennard.” *Id.* at ¶ 19.

15 On August 23, 2015, Solano County issued an arrest warrant for Malik. *Id.* at ¶ 21. On
16 September 9, 2015, San Francisco police officers arrested Malik pursuant to the arrest warrant at
17 San Francisco International Airport. At the time of her arrest, Malik was attempting to board a
18 plane to Germany with her four-year-old son and was four months pregnant. *Id.* at ¶ 23. Even
19 though Malik informed the officers that she was pregnant, they handcuffed her behind her back
20 with tight fitting handcuffs, “and left her in a vulnerable and dangerous position for several
21 hours.” *Id.* at ¶ 24.

22 Malik was charged in Solano County with defrauding Kennard, “and was forced to
23 undergo being criminally prosecuted for several months, while being forced to stay away from her
24 family in Germany.” *Id.* at ¶ 25. The case against Malik was dismissed on November 30, 2015
25 “due to evidence showing that Mr. Kennard had lied when he alleged to the police that [Malik]
26 had defrauded him.” *Id.* at ¶ 27; Solano’s Request for Judicial Notice (“RJN”) Ex. A.²
27

28 ² Solano asks the court to take judicial notice of the existence and content of the November 20,
29 2015 minute order in the matter of *The People of the State of California v. Yasmin Malik*, case

1 Malik alleges the following claims against Defendants: 1) 42 U.S.C. § 1983 claim for
2 excessive force in violation of the Fourth Amendment, against unidentified San Francisco police
3 officers; 2) section 1983 claim for deliberate indifference to Malik’s need for medical assistance in
4 violation of the Fourteenth Amendment, against unidentified San Francisco police officers; and 3)
5 section 1983 claim for malicious prosecution in violation of the Fourth Amendment, against Ash.³

6 Solano and Ash move to dismiss the complaint. San Francisco moves for judgment on the
7 pleadings.

8 **II. SOLANO AND ASH’S MOTION TO DISMISS**

9 Solano and Ash move to dismiss Malik’s Section 1983 claim for malicious prosecution,
10 which is the sole claim against Ash.⁴ They argue that Malik’s claim is barred by the applicable
11 statute of limitations; that the claim is barred by prosecutorial immunity; and that Malik fails to
12 state a claim for malicious prosecution.

13 **A. Legal Standard**

14 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in
15 the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).
16 When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all
17 of the factual allegations contained in the complaint,” *Erickson*, 551 U.S. at 94 (2007) (citation
18 omitted), and may dismiss a claim “only where there is no cognizable legal theory” or there is an
19 absence of “sufficient factual matter to state a facially plausible claim to relief.” *Shroyer v. New*

20 number FCR316552, which reflects the dismissal of the criminal case against Malik on the same
21 date. Federal Rule of Evidence 201(b) permits the court to take judicial notice of facts “not
22 subject to reasonable dispute” because they are either (1) “generally known within the trial court’s
23 territorial jurisdiction,” or (2) “can be accurately and readily determined from sources whose
24 accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). Courts may take notice of
25 other related court proceedings and filings. *U.S. ex rel. Robinson Rancheria Citizens Council v.*
Borneo, Inc., 971 F.2d 244, 248 (9th Cir. 1992). Malik does not object to the court’s taking
judicial notice of this court document, and concedes that the criminal case against her was
dismissed on November 30, 2015. *See Opp’n at 2*. Solano’s request for judicial notice is granted.

26 ³ Although Malik names Solano as a Defendant, her complaint does not assert a specific claim
against Solano.

27 ⁴ Solano and Ash also move to dismiss any state law claim for malicious prosecution, to the extent
28 Malik seeks to plead such a claim. Mot. at 6. Malik does not address a state law claim for
malicious prosecution in her opposition, thereby conceding the point.

1 *Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556
2 U.S. 662, 677-78 (2009); *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)) (quotation marks
3 omitted). A claim has facial plausibility when a plaintiff “pleads factual content that allows the
4 court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”
5 *Iqbal*, 556 U.S. at 678 (citation omitted). In other words, the facts alleged must demonstrate
6 “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action
7 will not do.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 (2007) (citing *Papasan v. Allain*, 478
8 U.S. 265, 286 (1986)); *see Lee v. City of L.A.*, 250 F.3d 668, 679 (9th Cir. 2001), *overruled on*
9 *other grounds by Galbraith v. Cty. of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002).

10 **B. Discussion**

11 Solano and Ash first argue that Malik’s section 1983 claim for malicious prosecution is
12 untimely under the applicable statute of limitations because it was filed more than two years after
13 the conclusion of her criminal prosecution.

14 A party may raise a statute of limitations defense on a motion to dismiss “[i]f the running
15 of the statute is apparent on the face of the complaint.” *Jablon v. Dean Witter & Co.*, 614 F.2d
16 677, 682 (9th Cir. 1980). Such a motion “can be granted only if the assertions of the complaint,
17 read with the required liberality, would not permit the plaintiff to prove that the statute was
18 tolled.” *Id.*

19 Section 1983 does not contain its own limitations period. *Cholla Ready Mix, Inc. v.*
20 *Civish*, 382 F.3d 969, 974 (9th Cir. 2004). The appropriate period is that of the forum state’s
21 statute of limitations for personal injury torts. *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir.
22 2004). In California, the statute of limitations for personal injury actions is the two-year period set
23 forth in California Code of Civil Procedure section 335.1, and is the applicable statute in section
24 1983 actions. *Id.* A section 1983 claim accrues when the plaintiff knows, or should know, of the
25 injury that is the basis for her claims. *Id.* at 955; *see also Pouncil v. Tilton*, 704 F.3d 568, 573-74
26 (9th Cir. 2012) (“Under federal law, accrual occurs when the plaintiff has a complete and present
27 cause of action and may file a suit to obtain relief.”). Malicious prosecution claims brought under
28 section 1983 accrue “upon favorable termination of the underlying criminal proceeding.” *Peinado*

1 v. *City & Cty. of San Francisco*, No. C-11-1799 EMC, 2013 WL 163473, at *3 (N.D. Cal. Jan. 15,
2 2013) (citing *Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 (9th Cir. 1998), *RK Ventures,*
3 *Inc. v. City of Seattle*, 307 F.3d 1045, 1060 n.11 (9th Cir. 2002)).

4 Here, it is undisputed that the criminal charges against Malik were dismissed on November
5 30, 2015. RJD Ex. A. Malik does not dispute that her section 1983 malicious prosecution claim
6 accrued on that date. Therefore, any action based on her injuries from her criminal prosecution
7 should have been filed within the next two years, or by no later than November 30, 2017. *See* Cal.
8 Civ Proc. Code § 335.1. Since Malik did not file the present complaint until December 5, 2017,
9 her claim against Solano and Ash is time-barred unless an exception to the statute of limitations
10 applies.

11 Malik argues that her claim is not barred based on the application of the continuing
12 violation doctrine. She contends that the doctrine “allows a court, in some instances, to consider
13 alleged unlawful behavior that would otherwise be time-barred,” citing *National Railroad*
14 *Passenger Corporation v. Morgan*, 536 U.S. 101, 122 (2002). Opp’n 2. According to Malik,
15 although the criminal case was dismissed on November 30, 2015, wrongful acts related to the
16 malicious prosecution continued beyond that date. In her opposition brief, she describes two
17 allegedly wrongful acts related to her underlying prosecution. Malik states that in April 2016,
18 “the District Attorney . . . wrongfully and maliciously informed the head of Solano County
19 Assessor’s Office that the plaintiff and her husband were criminals and to not change the
20 ownership information of the property that was the subject of the criminal case back to their
21 names,” even though the charges had been dismissed. Opp’n at 3. Additionally, she contends that
22 in June and July 2016,

23 City of Vallejo Attorney Eli Flusmann relayed to the plaintiff that he
24 had spoken with this same District Attorney, and she had falsely
25 indicated that the plaintiff had committed several crimes in relation
26 to the property in question, which caused the City Attorney’s Office
27 to file a lawsuit against the plaintiff, in which her and her husband’s
28 credibility and ownership of their property were challenged, due to
29 the intentionally wrongful information that the District Attorney
30 conveyed.

31 Id. at 3. Malik argues that these later related acts render her malicious prosecution claim timely
32 through application of the continuing violation doctrine.

1 As an initial matter, the complaint as currently pleaded does not contain any allegations
2 about the two 2016 events described in Malik’s opposition. Accordingly, the court cannot
3 consider those facts. *See Schneider v. Cal. Dep’t of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir.
4 1998) (“In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the
5 complaint to a plaintiff’s moving papers, such as a memorandum in opposition to a defendant’s
6 motion to dismiss.”).

7 Moreover, even if Malik were granted leave to amend her complaint to add allegations
8 about the two later events, *Morgan* would not save her claim. Before the Supreme Court’s
9 decision in *Morgan*, a plaintiff could establish a continuing violation in the employment
10 discrimination context by showing “a series of related acts one or more of which are within the
11 limitations period,” or by showing “a systematic policy or practice of discrimination that operated,
12 in part, within the limitations period—a systemic violation.” *Morgan*, 536 U.S. at 107 (quoting
13 *Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008, 1015-16 (9th Cir. 2000)). The
14 Supreme Court overruled the Ninth Circuit’s “related acts” method of establishing a continuing
15 violation, holding that “discrete discriminatory acts are not actionable if time barred, even when
16 they are related to acts alleged in timely filed charges.” *Morgan*, 536 U.S. at 113.⁵ Although
17 *Morgan* is a Title VII case, the Ninth Circuit has applied *Morgan* to determine the timeliness of
18 section 1983 claims. *See, e.g., RK Ventures, Inc.*, 307 F.3d at 1061 (applying *Morgan* to bar
19 section 1983 claims based on discrete time-barred acts). Under *Morgan*, Malik cannot rely on the
20 related specific acts that occurred within the two-year statute of limitations period in order to reach
21 back and salvage her untimely malicious prosecution claim.

22 Malik also argues that the statute of limitations was tolled due to “impossibility.” Opp’n 4.
23 In actions brought under section 1983, courts “apply the forum state’s law regarding tolling,
24 including equitable tolling, except to the extent any of these laws is inconsistent with federal
25 law.” *Canatella v. Van De Kamp*, 486 F.3d 1128, 1132 (9th Cir. 2007) (quoting *Jones v. Blanas*,

26
27 ⁵ The Supreme Court did not address the second method of proving a continuing violation, i.e., the
28 systematic pattern or practice method. *Id.* at 115 n.9; *Carpinteria Valley Farms, Ltd. v. Cty. of
Santa Barbara*, 344 F.3d 822, 829 n.3 (9th Cir. 2003). Malik does not allege a systematic pattern
or practice of wrongful acts by any of the defendants.

1 393 F.3d 918, 927 (9th Cir. 2004)). In California, a statute of limitations may be tolled “where
2 circumstances effectively render timely commencement of an action impossible or virtually
3 impossible.” *Grell v. Laci Le Beau Corp.*, 73 Cal. App. 4th 1300, 1305 (1999); *see also Lewis v.*
4 *Superior Court*, 175 Cal. App. 3d 366, 377-78 (1995) (holding statute of limitations tolled where
5 plaintiff’s attorney had calendared last date to file but was seriously injured in an automobile
6 accident five days before the statute expired).

7 According to Malik, both during her prosecution and after the charges were dismissed, she
8 “was dealing with a very complicated pregnancy, that rendered her almost completely be[d] ridden
9 [sic] and suffering from severe depression for at least a month after the charges were dismissed.”
10 Opp’n 4. She asserts that these conditions “prevented her from seeking any legal representation or
11 attempting in any manner to prosecute her [section] 1983 claim.” *Id.* As with her assertions about
12 the 2016 incidents allegedly related to her criminal prosecution, the court cannot consider facts
13 about Malik’s pregnancy and depression because they are not pleaded in the complaint. *See*
14 *Schneider*, 151 F.3d at 1197 n.1. The current complaint is devoid of any facts which would
15 support a finding that “timely commencement” of this action was “impossible or virtually
16 impossible.” *See Grell*, 73 Cal. App. 4th at 1305.

17 Therefore, as currently pleaded, Malik’s section 1983 claim for malicious prosecution is
18 untimely and must be dismissed.⁶ It seems unlikely that Malik will be able to plead sufficient
19 facts to establish tolling based on impossibility. Although her opposition states that she was
20 bedridden and suffering from severe depression “for at least a month after the charges were
21 dismissed,” she does not explain why she could not file a timely complaint sometime during the
22 next 23 months before the statute ran. However, the court cannot conclude at this stage that Malik
23 will not be able to allege facts sufficient to overcome this defect, and therefore grants Malik leave
24 to amend. *See Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000) (“[l]eave to amend should be
25 granted if it appears at all possible that the plaintiff can correct the defect.” (quotation omitted)).

26
27

⁶ Because the court finds that Malik’s malicious prosecution claim is time-barred, the court does
28 not address Solano and Ash’s other arguments in favor of dismissal.

1 **III. SAN FRANCISCO'S MOTION FOR JUDGMENT ON THE PLEADINGS**

2 San Francisco moves for judgment on the pleadings on the ground that Malik's claims are
3 barred by the two-year statute of limitations set forth in California Code of Civil Procedure 335.1.

4 **A. Legal Standard**

5 “After the pleadings are closed—but early enough not to delay trial—a party may move for
6 judgment on the pleadings.” Fed. R. Civ. P. 12(c). A motion for judgment on the pleadings
7 “challenges the legal sufficiency of the opposing party’s pleadings.” William Schwarzer et al,
8 *Federal Civil Procedure Before Trial* ¶ 9:316 (2014). “Rule 12(c) is functionally identical to Rule
9 12(b)(6) and . . . the same standard of review applies to motions brought under either rule.”
10 *Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011).
11 Thus, a judgment on the pleadings is appropriate when the pleaded facts, accepted as true and
12 viewed in the light most favorable to the non-moving party, entitle the moving party to a judgment
13 as a matter of law. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1301 (9th Cir. 1992); *see also Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

14 **B. Discussion**

15 San Francisco asserts that the two-year statute of limitations set forth in California Code of
16 Civil Procedure 335.1 applies to Malik’s section 1983 claims against San Francisco. It argues that
17 the arrest which gave rise to Malik’s claims for excessive force and deliberate indifference took
18 place on September 9, 2015, and that those claims accrued on that date. Malik did not file the
19 instant complaint until December 5, 2017, more than two years later. Accordingly, it argues, it is
20 entitled to judgment on the ground that her claims against San Francisco are untimely.

21 A section 1983 claim accrues when the plaintiff knows, or should know, of the injury that
22 is the basis for her claims. *Maldonado*, 370 F.3d at 955; *see Cabrera v. City of Huntington Park*,
23 159 F.3d 374, 381 (9th Cir. 1998) (a claim that law enforcement officers used excessive force
24 during an arrest accrues on the date of the arrest); *TwoRivers v. Lewis*, 174 F.3d 987, 991-92 (9th
25 Cir. 1999) (a claim for deliberate indifference to medical needs accrues “when the plaintiff knows
26 or has reason to know of the injury which is the basis of the action.”). Malik does not dispute that
27 the two-year statute of limitations set forth in California Code of Civil Procedure 335.1 applies,

1 and does not appear to dispute that her excessive force and deliberate indifference claims accrued
2 on September 9, 2015, the date of her arrest. However, she argues that the statute of limitations
3 was tolled for these claims during the pendency of her criminal prosecution pursuant to California
4 Government Code section 945.3. Therefore, she asserts, the statute of limitations did not begin to
5 run on her claims against San Francisco until November 30, 2015, when the criminal charges were
6 dismissed. Opp'n 3. As in her opposition to Solano and Ash's motion to dismiss, Malik contends
7 that her December 5, 2017 complaint was timely based on application of the continuing violation
8 doctrine and the doctrine of "impossibility." *Id.* at 3-5.

9 As previously noted, state law governs the application of tolling doctrines in section 1983
10 actions. *Canatella*, 486 F.3d at 1132. "In California, the statute of limitations for section 1983
11 actions is tolled by [California Government Code section] 945.3 while criminal charges are
12 pending." *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1995). Section 945.3 states:

13 No person charged by indictment, information, complaint, or other
14 accusatory pleading charging a criminal offense may bring a civil
15 action for money or damages against a peace officer or the public
16 entity employing a peace officer based upon conduct of the peace
officer relating to the offense for which the accused is charged,
including an act or omission in investigating or reporting the offense
or arresting or detaining the accused, while the charges against the
accused are pending before a superior court.

17 Any applicable statute of limitations for filing and prosecuting these
18 actions shall be tolled during the period that the charges are pending
before a superior court.

19 Cal. Gov't Code § 945.3. The first paragraph of section 945.3 is not applicable to section 1983
20 claims brought in federal court, but the tolling provision in the second paragraph does apply. See
21 *Harding v. Galceran*, 889 F.2d 906, 908 (9th Cir. 1989), *cert. denied*, 488 U.S. 1082 (1991).

22 Section 945.3 tolls the limitations period only if the civil action relates to "the offense for
23 which the accused is charged." It states that a civil claim is related to criminal charges where the
24 civil claim arises from "an act or omission in . . . arresting or detaining" the party accused of the
25 criminal offense. Cal. Gov't Code § 945.3. Here, San Francisco police officers arrested Malik on
26 September 9, 2015 pursuant to the Solano County arrest warrant. Malik's civil claims for
27 excessive force and deliberate indifference arise from the circumstances of that arrest.
28 Accordingly, since Malik's excessive force and deliberate indifference claims arise from "an act or

1 omission in . . . arresting or detaining” Malik, the criminal charge is related to the excessive force
2 and deliberate indifference claims. *See, e.g., Bagley v. City of Sunnyvale*, No. 16-CV-02250-LHK,
3 2017 WL 344998, at *6 (N.D. Cal. Jan. 24, 2017) (holding that unlawful entry and seizure and
4 excessive force claims arising from arrest were related to the crime for which the plaintiff was
5 arrested for purposes of section 945.3). Therefore, applying section 945.3, the two-year statute of
6 limitations on Malik’s excessive force and deliberate indifference claims was tolled until the
7 criminal charges for fraud were dismissed, on November 30, 2015.

8 Even though section 945.3 tolling applies here, it does not save Malik’s claim, for as
9 previously noted, Malik did not file suit until December 5, 2017, which was over two years after
10 the criminal charges were dismissed. Malik argues that her December 5, 2017 complaint was
11 timely based on the continuing violation doctrine as well as the doctrine of “impossibility.” Opp’n
12 3-5. As with her opposition to the motion to dismiss, Malik describes incidents related to her
13 prosecution that took place in 2016, as well as her pregnancy and depression. The court cannot
14 consider these facts because they are not pleaded in the complaint. Even if Malik were permitted
15 to amend the complaint to add the 2016 events, the continuing violation doctrine does not render
16 Malik’s claims against San Francisco timely for the same reasons stated above. Similarly, even if
17 the court were to consider Malik’s statements in her opposition about her pregnancy and
18 depression, they would be insufficient to support tolling of the statute of limitations based on
19 impossibility. Accordingly, judgment in San Francisco’s favor is appropriate. Malik is granted
20 leave to amend to add allegations regarding tolling based on impossibility to the extent she can do
21 so in a manner consistent with Rule 11.

22 //

23 //

24 //

25 //

26 //

27 //

28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IV. CONCLUSION

Solano and Ash's motion to dismiss and San Francisco's motion for judgment on the pleadings are granted. Any amended complaint must be filed within ten days of the date of this order.

IT IS SO ORDERED.

Dated: June 28, 2018

